

attendant skewing of investment incentives. Compared to a "competitor necessity" test, it would nevertheless constitute an improvement.

IV. Customer Necessity

Competition is a means to an end. It supplies a method for promoting consumer sovereignty through a dynamically evolutionary process of discovery and selection in the economic marketplace.¹⁷ The proper measure of the effectiveness of that process is how good a job it does meeting consumer requirements. Satisfaction of consumer tastes and preferences is the most basic and compelling measure of economic performance. Thus, the question that should be relevant for public policymaking is not how well competitors make out in the competitive struggle, but how well consumers fare.

"Competitor necessity" regulation and "competitive necessity" regulation may induce economically inefficient marketplace transactions, provide encouragement and a protected haven for inefficient competitors, skew investment decisions, and fail to minimize costs of production. They also threaten achievement of social objectives and rob the competitive process of the vigorous competitive rivalry, service innovation and product diversity that are the hallmarks of genuine competition. Instead of regimes that promote the interests of competitors through asymmetrical restrictions on the freedom of some competitors to compete, we think the public interest would be better served by a regime of "customer necessity" regulation that promotes the interests of customers through symmetrical removal of restraints on any competitor's ability to compete.

Effective competition compels adoption of an efficient structure of prices. That implies that customers who are cheaper to serve will pay prices that are lower than customers who are more expensive to serve. It implies that customers who have alternatives will tend to bear a smaller fixed-cost burden than those who do not. It implies that any subsidies to achieve social objectives will have to be targeted specifically toward those in need and be

¹⁷ See Joseph Schumpeter (1950) and Friedrich Hayek (1978).

funded collectively. It implies that investment decisions will be taken on the basis of real economic rewards rather than an artificial set of gerryrigged payoffs that depend on expansive regulatory protection and promotion. It implies that economic ability to compete effectively in the marketplace will count for more than legal ability to wage war in the regulatory arena.

In its Competitive Carrier rulemaking, the FCC recognized that, to respond to customer requirements, non-dominant carriers would need to employ unique pricing arrangements which would sometimes result in differences in rates to apparently similarly situated customers. The Commission found these differences "a normal response to competitive forces in the marketplace in which these carriers operate."¹⁸ Thus it held individual customer offerings presumptively lawful at least when made by carriers that lack market power.

While all carriers are subject to the behavioral proscriptions contained in the Communications Act of 1934, including the proscriptions against unreasonable discrimination, the FCC does not, in fact, subject non-dominant carriers to any systematic regulatory scrutiny. Clearly, the question of whether an offering is unreasonably discriminatory does not turn on the identity or status of the carrier offering it. Equally clearly, carriers that can more easily offer customer-specific deals are competitively advantaged relative to those that cannot. They thus have a plain interest in maintenance of asymmetrical regulatory treatment that affords them more effective freedom to do so until such time as the leading incumbent is no longer the leading incumbent.

In our view, the government has basically two alternative courses of action: (1) it can afford all carriers the same opportunities to compete and rely on competition to prevent undue discrimination or (2) it can limit the freedom of all carriers to compete and rely on regulatory monitoring to insure against undue discrimination. We believe the first course of action is highly preferable. The second option would require that all carriers be regulated. That would impose administrative burdens symmetrically on all carriers and subject

¹⁸ See Rates for Competitive Common Carrier Services, 77 FCC 2d 308 (1979).

all carriers to strategic abuse of the regulatory process by rivals. It could also turn the Federal Communications Commission into a Federal Communications Cartel, with the government serving as a clearinghouse for competitively sensitive information and a cartel manager. Under oligopolistic industry organization, this is presumably just what the government should not do to promote vigorous competitive rivalry.

V. SYNOPSIS

To promote effective competition and to reap all the benefits an effective competitive process is capable of producing, we think all carriers should be permitted and encouraged to "be all that they can be." Rigging the competitive game may benefit particular competitors, but it simultaneously limits the effectiveness of competition and the benefits consumers can legitimately expect competition to produce.

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